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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

NO. 205.

THE PULLMAN COMPANY,

Petitioner,

vs.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, A. G. WISE, and G. H. HARRIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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June 26, 1963.

GILLESPIE-SHEALY COMPANY, CHICAGO 868

SUBJECT INDEX

	PAGE
Question Presented	1
Statutes Involved	2
Statement of the Case	2
Reasons for Denying the Writ	3
Argument	5
The Question Sought to be Reviewed is Not Properly Presented on the Record	5
The Question Sought to be Reviewed is Not of Sufficient Importance to Warrant Certiorari	6
Conclusion	8

TABLE OF AUTHORITIES.

Cases.

Helvering v. Wood, 309 U. S. 344 (1940)	6
Rudolph v. United States, 370 U. S. 269 (1962)	7

Statutes and Rules.

Norris-LaGuardia Act, 29 U. S. C. § 101 et seq.	2
Supreme Court Rules:	
Rule 19	4, 6
Rule 23.1 (c)	4

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ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, A. G. WISE, and G. H. HARRIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The above-named respondents will be referred to herein as the Conductors, and petitioner will be referred to as Pullman.

QUESTION PRESENTED

Pullman apparently wishes to present for review only one question: whether the parties "exerted every reasonable effort" to settle the dispute over job security in their handling of certain settlement proposals made by the Conductors in December, 1961 (Petn. 2). These proposals were

based on suggestions made by the Emergency Board in its report of December 11, 1961 for settlement of job protection demands originally submitted to Pullman by the Conductors on November 7, 1960 (Petn. 5, 6, 21, 26).

As will hereinafter be shown, Pullman has materially shifted its position with respect to these settlement proposals, and as a result of such departure from its original theory of the case, the question as now stated by Pullman is not properly presented for review on the record brought here.

STATUTES INVOLVED

The petition fails to state that the Norris-LaGuardia Act, 29 U. S. C. § 101, et seq., is involved, as noted in the opinion below (Petn. 15, 26).

STATEMENT OF THE CASE

Pullman's statement of the case (Petn. 2-4) is misleading in that it fails to state the position originally taken by Pullman on the job protection settlement proposals made by the Conductors in December, 1961. It is also misleading in that it gives the impression that these settlement proposals were the only issues involved in the strike notice issued April 2, 1962.

Actually, these settlement proposals were only two of many issues remaining unsettled when the strike was set (R. 105-106, 119, 169-171). The unsettled issues include, among others, a reduction of the basic work month for Conductors from 205 hours to 180 hours as requested by the Conductors and specifically recommended by the Emergency Board (R. 183). Although "tentative" agreement had been

reached on the application of the 180-hour month (R. 63), even this was not put into effect because of Pullman's rejection of the job protection proposals (R. 105). The Conductors were advised on the dates these proposals were made, December 28 and 29, 1961, that Pullman "would not consider" them (R. 103-105). The position of the Conductors, as stated by their representative, Mr. Wise, to Pullman's representative, Mr. Boeckelman, is clearly shown by the following (R. 106):

> "* * * I said to Mr. Boeckelman, 'You have our proposals. You have not submitted any proposals on these issues. You have ours. It would be appreciated if you would give further consideration to these, and we will be available. You know where to get in touch with me, and we will be available any time you want a conference, and we will be there.'"

Pullman's Complaint alleges that the Conductors violated the Railway Labor Act by making such proposals (R. 7-10). Pullman charged (1) that both proposals were beyond the scope of any previous notice served under Section 6 of the Railway Labor Act, and (2) that the so-called "Joint Proposal" of December 28, 1961 submitted by the Conductors was not bargainable and was "improper and unlawful" under the Railway Labor Act (R. 10). Pullman's position as to these settlement proposals was sustained by the District Court, which granted an injunction on both of these grounds relied on by Pullman (R. 245-247).

REASONS FOR DENYING THE WRIT

1. Pullman, having taken the position outlined above with respect to the settlement proposals of December, 1961, cannot now be heard to urge that certiorari should be granted on the theory that these proposals "required fur-

ther discussion and negotiation" (Petn. 5). This new theory seeks, in effect, not a review of the case is it was decided below, but a trial *de novo* in this Court, with leave to Pullman to amend its Complaint so as to seek an injunction on a new ground wholly inconsistent with those passed on below. It follows that the question presented by Pullman for review is not "expressed in the terms and circumstances of the case", as required by Rule 23-1(c) of this Court.

2. The question sought to be reviewed does not meet the standards indicated in this Court's Rule 19. Pullman has shown no special or important reasons for the exercise of this Court's discretion to review on writ of certiorari.

ARGUMENT.

The Question Sought to be Reviewed is Not Properly Presented on the Record.

Pullman asserts that the Court of Appeals "mistakenly treated the appeal as if it involved a question of notice under Section 6 of the Railway Labor Act, representing Pullman as claiming that the organization had not observed the correct procedure in submitting its proposals and therefore had not earned the right to strike" (Petn. 5). Pullman insists that it "made no such claim" (Petn. 5).

The record here does not bear out Pullman's assertion that it made no such claim. The Complaint makes the claim that the Conductors violated the Railway Labor Act by submitting a proposal which "was not included in defendants' notice of November 7, 1960, or any other notices served by defendants pursuant to Section 6 of the Railway Labor Act" (R. 7-10). The District Court sustained this claim of Pullman in the following conclusion:

> "The proposals first presented by defendants in December, 1961, raised new issues beyond the scope of any notice previously served by defendants pursuant to Section 6 of the Railway Labor Act" (R. 246).

When the Conductors moved the District Court to vacate the injunction which had been granted, Pullman successfully claimed as follows:

> "These radically different proposals [of December 28 and 29, 1961], however, were never served formally under Section 6, and no strike could be called over them" (R. 258).

Having made such a record, Pullman obviously is not in a position now to disown the fact that the anti-strike in-

junction was obtained by it on the ground (among others now apparently abandoned) that the Conductors illegally made proposals not covered by proper Section 6 notices. Yet Pullman now takes the opposite position that these proposals were adequately covered by the Conductors' Section 6 notice of November 7, 1960 (Petn. 5), that Pullman never raised any objection to the settlement proposals on the ground that no notice was served (Petn. 7), and that the Court of Appeals was concerned with "a nonexistent notice question" (Petn. 8).

Pullman now says that review should be had on the question of "adequacy of negotiations" regarding the settlement proposals made by the Conductors in December, 1961 (Petn. 8). This would inject a new issue which Pullman would not be entitled to raise here even if certiorari were granted. A petitioner should not be allowed "to add here for the first time another string to his bow." *Helvering* v. *Wood*, 309 U. S. 344, 349 (1940).

In short, Pullman would have the Conductors' settlement proposals of December, 1961 do double duty: to provide the basis for an injunction below on the theory that the proposals should not have been made at all, and to provide the basis for review here on the theory that they were worthy of more consideration than they received.

The Question Sought to be Reviewed is Not of Sufficient Importance to Warrant Certiorari.

We have not noted any specific claim made by Pullman that the question it seeks to present is one which merits discretionary review under the criteria indicated in Rule 19 of this Court. The petition is, to a considerable extent, a mere quarrel with the opinion of the Court of Appeals re-

garding its view of the ultimate facts involved, principally those concerning the character and extent of negotiations between December, 1961 and April, 1962 regarding the Conductors' settlement proposals (Petn. 7-10). Certiorari is usually not warranted in such cases involving questions of ultimate facts because "their review would be of no importance save to the litigants themselves". *Rudolph* v. *United States*, 370 U. S. 269, 271 (1962).

However, we assume that Pullman believes the question it would have this Court decide is one of general importance. Pullman's present posture in this case is that "not even the first requirement" of negotiation under the Railway Labor Act has been met (Petn. 4). This argument necessarily supposes that the settlement proposals made by the Conductors in December, 1961 required a re-run of the Railway Labor Act procedures of negotiation, mediation and Emergency Board consideration. Pullman's proposition evidently is that after these procedures have been completed in a railway labor dispute without producing a settlement, if either party then proposes a new solution to the dispute, that proposal starts the whole procedure over again, and neither party can resort to self help until the second cycle is completed, and then only if no additional new settlement proposal is made by either side requiring a third cycle. It is not surprising that Pullman has cited no case which interprets the Railway Labor Act as providing such a means for perpetuating the *status quo* in a railway labor dispute. We submit that unless and until some court does so interpret the Railway Labor Act, the question does not merit review here.

CONCLUSION.

Respondents submit that the petition does not disclose any sufficient reason for granting certiorari, and that the writ should be denied.

Respectfully submitted,

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